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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 183.

THOMAS J. PENDERGAST, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Thomas J. Pendergast, in support of his petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered June 1, 1942, affirming his conviction for alleged criminal contempt on June 7, 1941 (whereunder he was sentenced to serve a term of two years in a penitentiary) by a purported statutory court, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

As indicated in the majority opinion below (R. 1188), the essential facts must be stated with particularity to

present properly the matter involved. This proceeding was initiated by an information by the United States on July 13, 1940, upon the official oath of the acting United States Attorney, entered upon the criminal docket of the Central Division of the Western District of Missouri as cause No. 5040 (R. 1). It was entertained by a purported statutory court constituted of Judge Kimbrough Stone, presiding judge of the United States Circuit Court of Appeals for the Eighth Circuit, and Judges Albert L. Reeves and Merrill E. Otis of the District Court for the Western District of Missouri. The information, briefly summarized charged (a) the pendency of certain insurance rate litigation whereunder interlocutory injunctions had issued restraining interference by Missouri officials with a promulgated rate increase by insurance companies, (b) the filing on June 18, 1935 by such companies of a motion for decree in accordance with a stipulation of settlement, (c) the entry by the purported statutory court on February 1, 1936 of the decree as prayed, (d) that such settlement was corruptly procured by Charles R. Street, representative of the insurance companies, by the payment of divers sums of money to petitioner T. J. Pendergast and R. E. O'Malley, then Missouri Superintendent of Insurance, a co-defendant, A. L. McCormack, acting as intermediary, and (e) that Pendergast, O'Malley and McCormack agreed to conceal such transactions which were eventually disclosed by McCormack in March, 1939 to a grand jury investigating income tax evasion on the part of Pendergast. After an appropriate motion to quash was filed (R. 10-14) and overruled with opinion filed (R. 21-31), petitioner answered (R. 32, 33). The proceeding came on for trial on April 14, 1941. Apart from the testimony of McCormack (R. 694-733) the material evidence was entirely documentary. An examination of the brief testimony of McCormack will reveal the only allegedly contemptuous acts charged against petitioner.

The Insurance Rate Litigation.

It appears by stipulation that on December 31, 1929 certain insurance companies in Missouri promulgated a rate increase and so advised the Missouri Superintendent of Insurance (R. 363). Before official action thereon in approval or disapproval, bills in equity were filed in the United States Court for the Central Division of the Western District of Missouri seeking injunctive relief against official interference with the rate increase in question (R. 363, 364). The Superintendent thereupon refused to approve the increase and amended bills were filed (R. 364-435). The bills in equity proceeded upon the theory that the action of the Superintendent as to rates was arbitrary, unconscionable and confiscatory (R. 365-435). A special master was appointed on September 22, 1930 (R. 602). In the meantime, on July 2, 1930, an interlocutory injunction had issued upon the ground of the allegedly confiscatory character of the action of the Superintendent (R. 502), wherein official interference with the increased premium rates was restrained (R. 503), upon the condition, however, that the entire amount representing such increase should be impounded (R. 505) with a custodian appointed by the court (R. 506, 507). The special master, after hearings, filed a report, as to a number of the cases, sustaining the position of the companies*. A supplemental report, as to the remaining cases, was to follow. While the matter of the approval of this report was pending before the court, the companies on June 18, 1935 filed a verified motion for decree, reciting that the litigation had been compromised (R. 603). On June 19, 1935 there was filed a stipulation of settlement in support of the motion for decree (R. 607). The actual compromise was accomplished by an agreement of May 18, 1935, and the motion and stipulation aforesaid were prepared pursuant thereto (R. 890). On February 1, 1936 the court entered its decree dis-

*28 Fed. Supp. 601, l. c. 603.

missing the causes and directing the distribution of the impounded funds (R. 617). The substantial effect of the compromise was the retroactive approval by the Superintendent of four-fifths of the promulgated rate increase and the distribution of the impounded funds in accordance therewith.

The Transactions Between Street and Pendergast, O'Malley and McCormack in 1935 and 1936.

The testimony of McCormack is the sole evidence upon this issue and, since it is brief, and to avoid controversy, may appropriately be digested:

McCormack was engaged in the general insurance business in St. Louis, Missouri, and for a time was president of the Missouri Fire Insurance Agents Association (R. 694-697). In the latter part of 1934 or in the early part of 1935, O'Malley, then Superintendent of Insurance, inquired of McCormack if the companies were interested in a settlement of the rate litigation (R. 699). He proposed a meeting between Street and Pendergast (R. 699). Street was chairman of the committee in charge of the Missouri situation on behalf of the companies (R. 700). The meeting was arranged and took place in Chicago (R. 702, 703). In conference with Pendergast, Street pointed out that the "insurance companies had won this case" (presumably referring to the favorable report of the special master) but that the business of the companies was nevertheless suffering and their agents were complaining (R. 704). He expressed a desire to expedite the final disposition of the litigation (R. 704), and offered to pay Pendergast a fee of $500,000.00 to accomplish that end, to which the latter replied that "he would see what he could do about it" (R. 705). Early in 1935 (R. 782, 783) Street gave McCormack $50,000.00 which the latter delivered to Pendergast in Kansas City (R. 706, 707). On another occasion, during the early part of the same year (R. 783), Street delivered a further $50,000.00 to McCormack, who brought it to Pendergast in Kansas City; the latter retained $5,000.00 and McCormack and O'Malley divided the remaining $45,000.00 (R. 709, 710). Subsequently, in the spring or early

summer of 1936 (R. 783), Street gave McCormack $330,000.00, and the latter brought that sum to Kansas City (R. 711). Pendergast took $250,000.00 and gave McCormack $80,000.00 (R. 712). McCormack divided the $80,000.00 with O'Malley (R. 713, 714). In October, 1936 (R. 783), when Pendergast was ill in the hospital, McCormack at the instance of Street delivered to him a further sum of $10,000.00 (R. 783, 784, 716, 717).

In May, 1935, McCormack attended a conference at the Muehlebach Hotel in Kansas City, Missouri, called for the purpose of attempting to effect a settlement of the rate litigation (R. 724). Street, O'Malley and various counsel attended; Pendergast was not present (R. 724). The conference extended into the night before agreement was reached (R. 724, 725).

In February and March of 1939, McCormack appeared before the grand jury investigating charges of income tax evasion against Pendergast and O'Malley (on account of their failure to report the receipt of the sums mentioned*) and was interrogated with reference to his delivery of the various sums of money mentioned (R. 717). He appeared before the grand jury three or four times (R. 717). Upon his first appearance he did not testify to the transactions in question** (R. 718). While he was thus under subpoena before the grand jury he saw O'Malley *but not Pendergast* (R. 719). He did not discuss his testimony with him (R. 719). O'Malley remarked in substance that "he *hoped* nothing would develop that would involve *him*" (R. 722).

McCormack testified affirmatively that there was no agreement (as charged in the information) to keep the transactions in question secret or to prevent the court from discovery thereof (R. 728). After O'Malley had expressed the *hope* that his name would not be brought into the matter, McCormack nevertheless disclosed the entire history of the transactions in question (R. 728).

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*28 Fed. Supp. 601, l. c. 604.

**This proof, consistent with refusal to testify on constitutional grounds, was referred to by the trial court as an admission of perjury (R. 27).

It will be noted that the testimony of this government witness (the only witness upon the issue) does not sustain the findings of fact by the trial court (R. 51).

The Grand Jury Investigation of Pendergast and O'Malley in March, 1939 on Charges of Income Tax Evasion, the Agreement of Pendergast with the United States, and the Plea of Guilty Entered Pursuant Thereto.

As appears from the information (R. 8) and from the testimony of McCormack (R. 717), a grand jury investigation of Pendergast and O'Malley on charges of income tax evasion for having failed to report the receipt of the sums mentioned from Street was conducted during February and March of 1939*. There is no claim that that grand jury investigation concerned the rate litigation; the issue was solely one of income tax evasion. Pendergast and O'Malley were indicted therefor (R. 841, 858, 859). It was subsequently agreed between the United States and Pendergast and O'Malley that, if the latter entered pleas of guilty to the tax evasion indictments, there would be no further prosecution on account of other offenses. The agreement took into account specifically the alleged contempt arising from the transactions incident to the compromise of the insurance rate litigation, and it was in terms agreed that there would be no prosecution therefor (R. 840, 841, 842, 843, 845, *et seq.*). This agreement was confirmed in open court by the acting United States Attorney (R. 845), by the Chief of the Appellate Section of the Criminal Division of the office of the Attorney General of the United States (R. 848), and by the United States Attorney who had made the original agreement (R. 852, 853). Pursuant to that agreement Pendergast entered the plea of guilty (R. 843, 845). After the entry of such plea, but before sentence, the United States Attorney fully advised the trial court (in scrupulously carrying out the agreement made) that the plea concluded

*Opinion, *United States* v. *Pendergast, United States* v. *O'Malley*, 28 Fed. Supp. 601, l. c. 604.

all proceedings against Pendergast, including any proceeding for alleged contempt, and that there would be no prosecution therefor (R. 842, 843). Sentence was imposed, and served (R. 843, 844).

The Reopening of the Insurance Rate Litigation.

When the foregoing transactions were disclosed, the successor Superintendent of Insurance on May 29, 1939 filed a motion to cite the insurance companies to show cause why the decree of February 1, 1936 should not be vacated or modified (R. 746). On the same day the court entered an order of restitution, directing that all funds paid out to the insurance companies under the decree of February 1, 1936 be restored to the custodian (R. 756). An order to show cause was also entered on the same date whereunder the insurance companies were directed thus to show cause why the restored funds should not *instanter* be distributed among the policyholders (R. 758). On August 14, 1940, the court entered its decree directing the distribution among the policyholders of the funds theretofore, under the decree of February 1, 1936, ordered paid to the insurance companies or their representatives (R. 628).

The Conviction and Subsequent Proceedings.

Upon these facts the trial court filed its opinion on May 28, 1941 (R. 50), and judgment and sentence were pronounced on June 7, 1941 (R. 65).

This proceeding was entitled cause No. 5040 on the criminal docket of the Central Division of the Western District of Missouri up to the time of final judgment (R. 1). As a part of such judgment the trial court directed the clerk to restyle all pleadings and orders theretofore filed by adding to the designation, cause No. 5040, the descriptive term "a proceeding in contempt incidental to equity cases Nos. 270 to 426, inclusive". (R. 66, 1184). While in the record the information and present plead-

ings and orders carry that descriptive style, they were not so styled up to the time of final judgment, and then were retroactively modified by the clerk in obedience to the order.

Appeals were taken both to this Court and to the Court of Appeals. *Thomas J. Pendergast* v. *United States*, 314 U. S. 574, 86 L. Ed. 55. Upon appeal, in the court below, petitioner contended: (1) that neither the acts charged nor proved constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice; (2) that prosecution was barred by laches and the statute of limitations; (3) that petitioner's conviction should be reversed and further proceedings stayed, for the reason that his prosecution is in violation of an agreement with the United States; (4) that the court below was without jurisdiction These contentions were rejected (R. 1188 *et seq.*). This petition is filed within thirty days next after final judgment on June 1, 1942.

B.

STATEMENT OF THE JURISDICTION OF THIS COURT.

(1) Statutory provision believed to sustain the jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347(a)), and under the same Act c. 229, Section 8, 24 Stat. 940 (28 U. S. C. A. 350).

(2) The date of the judgment to be reviewed.

The judgment of the Circuit Court of Appeals for the Eighth Circuit affirming the conviction of petitioner was entered on June 1, 1942 (R. 1213-1214). The issuance of the mandate has been stayed pending this application (R. 1218). This petition, with supporting brief, and the

certified record, are filed within thirty days next after final judgment.

(3) Statement of the nature of the case and the rulings of the Circuit Court of Appeals bringing the case within the jurisdiction of this court.

The nature of the case (a prosecution for criminal contempt) has been heretofore stated. The Circuit Court of Appeals ruled: (1) that, although no act of petitioner occurred in the presence of the court or in any geographical proximity thereto, he was nevertheless guilty of misbehavior in the presence of the court, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and hence was punishable upon information for contempt (R. 1197); (2) that this prosecution is not barred by the fact that all allegedly contemptuous acts occurred more than three years next before the filing of the information, upon the ground that no statute of limitations is applicable to a prosecution for contempt for misbehavior in the presence of the court (R. 1197); (3) that, although the prosecution of petitioner was in breach of his agreement with the United States, such agreement did not give rise to any equitable right to have the proceedings stayed pending application for executive clemency (R. 1201); (4) that the trial court was vested with jurisdiction (R. 1205). Each of such rulings is reviewable by this court under the appropriate statutory provisions noted.

(4) Cases believed to sustain the jurisdiction of this court.

This court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction, to review the judgment below, are cited hereafter in connection with petitioner's reasons for the allowance of the writ of certiorari.

C.

THE QUESTIONS PRESENTED.

(1) Did the conduct of petitioner constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and thereby render him punishable for contempt upon information?

(2) Was prosecution of petitioner under the information barred by laches and the statute of limitations in view of the admitted fact that any and all acts of alleged contempt (i. e., misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice) occurred more than three years next before the filing of the information?

(3) Should the conviction below be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States?

(4) Was the purported statutory court vested with jurisdiction to entertain this independent criminal prosecution at law for alleged contempt or to impose therein a punitive sentence? If the purported statutory court was thus without jurisdiction to entertain this proceeding, is its judgment convicting petitioner validated by the fact that one of its members, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, when, under the rules of the District Court for the Western District of Missouri, no member of the purported statutory court was, at the time of the institution of this prosecution, judge of or for the Central Division of the Western District of Missouri?

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) In ruling (R. 1197) that the conduct of petitioner constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and thereby rendered him punishable for contempt upon information, although petitioner at no time was in the presence of the court or in geographical proximity thereto, no misbehavior there occurred, and no claimed misbehavior disrupted order or decorum or actually interrupted the court in the conduct of its business, the Circuit Court of Appeals (Riddick, J., dissenting) has decided a federal question in a way probably in conflict with applicable decisions of this Court, viz: *Ex parte Robinson*, 86 U. S. 505, 22 L. Ed. 205, *Nye* v. *United States*, 313 U. S. 33, 85 L. Ed. 1172; and has rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter, viz: *Wimberly* v. *United States*, 119 Fed. (2d) (5th Circuit) 713, *Warring* v. *Colpoys*, 122 Fed. (2d) (C. A. D. C.) 642. See further: *Dissenting opinion below of Riddick, J.* (R. 1206); *Morgan* v. *United States*, 95 Fed. (2d) (8th Circuit) 830; *Ex parte Poulson*, 19 Fed. Cases 1205, Case No. 11350; *Ex parte Schulenburg*, 25 Fed. 211; *Boyd* v. *Glucklich*, 116 Fed. 131; *Millinocket Theatre* v. *Kurson*, 39 Fed. Supp. 979.

(2) In ruling that the prosecution of petitioner under the information was not barred by the statute of limitations or laches, despite the admitted fact that all acts of alleged contempt (*i. e.*, alleged misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice) occurred more than three years next before the filing of the information, and in further ruling that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) was inapplicable either

by analogy or enactment, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court, viz: *Gompers* v. *United States*, 233 U. S. 604, 58 L. Ed. 1115, *United States* v. *Goldman*, 277 U. S. 229, 72 L. Ed. 862, *Ex Parte Grossman*, 267 U. S. 87, 69 L. Ed. 527, or, if the ruling below is not in conflict with the foregoing decisions of this Court, as petitioner contends, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court. The ruling below is unmistakably in conflict with the doctrine of the *Gompers Case* as heretofore judicially construed (*e. g.*, *Appeal of Marks*, 144 Pa. Sup. Ct. R. 556, 20 Atl. (2d) (Pa.) 242, *In re Jibb*, 123 N. J. Eq. 251, 197 Atl. 12, *Hart* v. *Oil Co.*, 27 Fed. Supp. 713), and with the weight of authority (*e. g.*, *Beattie* v. *People*, 33 Ill. App. 651, *Goodall* v. *Superior Ct.*, 37 Cal. App. 723, 174 Pac. 924, *Gordon* v. *Commonwealth*, 141 Ky. 461, 133 S. W. 206, *Brewer* v. *State*, 176 Miss. 803, 170 So. (Miss.) 540, *Pate* v. *Toler*, 190 Ark. 465, 79 S. W. (2d) (Ark.) 444, *State* v. *Phipps*, 174 Wash. 443, 24 Pac. (2d) (Wash.) 1073); hence if, contrary to the contention of petitioner, the ruling below is not literally in conflict with the *Gompers Case*, it presents an important question of federal law which should be settled by this court.

(3) In ruling that the conviction below should not be reversed or further proceedings stayed, by reason of the fact that the prosecution of petitioner under the information is in violation of his agreement with the United States, the Circuit Court of Appeals has decided a federal question in a way probably in conflict with an applicable decision of this court, viz: *United States* v. *Ford*, 99 U. S. 593, 25 L. Ed. 399, declaring the rule that an agreement with the United States creates an equitable right to a stay of any proceedings violative of the agreement, pending application for executive clemency, which, in the instant case, the Executive is empowered to grant

(*Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527); or, if such ruling is not thus in conflict, as petitioner contends, the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

(4) In ruling that the purported statutory court was vested with jurisdiction to entertain this independent criminal prosecution at law, and in finally ruling that the conviction of petitioner was in any event validated by the fact that one of the members of such court, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, when, under the rules of the District Court for the Western District of Missouri, no member of the purported statutory court was, at the time of the institution of this prosecution, judge of or for the Central Division of the Western District of Missouri, the Circuit Court of Appeals decided a federal question (*i. e.*, the jurisdiction of a statutory court to entertain a criminal proceeding at law for contempt) in a way probably in conflict with applicable decisions of this court, viz: *Thomas J. Pendergast* v. *United States*, 314 U. S. 574, 86 L. Ed. 55, *Phillips* v. *United States*, 312 U. S. 246, 85 L. Ed. 800, *Public Service Commission* v. *Brashear Freight Lines*, 312 U. S. 621, 85 L. Ed. 1082, *Ex parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249. Compare: *Gompers* v. *Stove Co.*, 221 U. S. 418, 55 L. Ed. 797, *Michaelson* v. *United States*, 66 U. S. 42, l. c. 64, 69 L. Ed. 162, l. c. 167, and *Russell* v. *United States*, 86 Fed. (2d) 389, l. c. 392, declaring the rule that a criminal proceeding for contempt is an action at law, a separate and independent proceeding, and neither a part of nor incidental or ancillary to the cause out of which the contempt allegedly arose.

Conclusion.

Each of the questions presented is of grave public importance. Unless the majority ruling below is reviewed, the law relating to contempt, both as to the substance of

the offense and the question of limitations, will be left in confusion. Prosecutions for contempt are increasing in number, and the conflicts with this Court and between circuits are unmistakable. The effect of an agreement with the United States and the jurisdiction of a statutory court to entertain a criminal proceeding for contempt are equally questions of fundamental importance which in the public interest should be determined.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket Nos. 12075 and 12117, *criminal, Thomas J. Pendergast, appellant, vs. United States of America, appellee*, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment of said Circuit Court of Appeals be reversed by this court; and your petitioner prays that the certified copy of the record and proceedings of said United States Circuit Court of Appeals for the Eighth Circuit, filed with this petition, may be treated as a return to said Writ of Certiorari; and your petitioner prays that he may have such other and further remedies in the premises as to the Court may seem appropriate and in conformity with law.

Thomas J. Pendergast,
Petitioner.

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No. .....

THOMAS J. PENDERGAST, PETITIONER,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals for the Eighth Circuit, filed June 1, 1942, is not as yet officially reported (R. 1188). A dissenting opinion was filed (R. 1206). The opinions of the trial court, both on motion to quash (R. 21) and on final judgment (R. 50, 65), are reported. *35 Fed. Supp. 593; 39 Fed. Supp. 189.*

B.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The statement of the grounds on which the jurisdiction of this Court is invoked appears as part of the foregoing Petition for Writ of Certiorari (Statement of the Juris-

diction of this Court, *supra*, p. 9 *et seq.*), and is hereby adopted and made a part of this brief.

C.

STATEMENT OF THE CASE.

The statement appears as part of the foregoing Petition for Writ of Certiorari (*Summary Statement of the Matter Involved, supra*, p. 1 *et seq.*), and is adopted and made a part of this brief.

D.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

(1) The Circuit Court of Appeals, and the trial court, erred in holding, deciding and finding petitioner guilty of contempt, i. e., misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385).

(2) The Circuit Court of Appeals, and the trial court, erred in holding that the acts charged against petitioner constituted misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385).

(3) The Circuit Court of Appeals, and the trial court, erred in holding that the acts shown in evidence constituted misbehavior on the part of petitioner in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385).

(4) The Circuit Court of Appeals, and the trial court, erred in holding that the prosecution under the information of petitioner was not barred by the statute of limitations (i. e., R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) or

by the fact that the information was not filed within three years next after the alleged contemptuous acts.

(5) The Circuit Court of Appeals, and the trial court, erred in refusing to give effect to the agreement between the United States and petitioner whereunder it was agreed that, if petitioner entered a plea of guilty to an indictment charging income tax evasion, he would not be prosecuted for alleged contempt; by reason of such agreement the instant prosecution should either have been abated or stayed pending an application for executive clemency and appropriate action thereon by the Executive.

(6) The Circuit Court of Appeals, and the trial court, erred in holding that the latter was vested with jurisdiction to entertain this proceeding for criminal contempt, and to impose therein a punitive sentence.

(7) The Circuit Court of Appeals, and the trial court, erred in holding that, if the trial court was without jurisdiction in this proceeding, its judgment convicting petitioner was validated by the fact that one of its members, as then District Judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation.

(8) The trial court erred in refusing to sustain petitioner's motion to declare him not guilty and to dismiss the proceeding (R. 876), and the Circuit Court of Appeals erred in affirming such ruling.

E.

SUMMARY OF THE ARGUMENT.

POINT I.

The conduct of petitioner did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385) and did not render him punishable for contempt upon information. Petitioner at no time was in the presence of the court or in geographical proximity thereto. No misbehavior there occurred. No claimed misconduct disrupted order or decorum or actually interrupted the court in the conduct of its business. The majority opinion below (Riddick J., dissenting) reverts to the doctrines of the Toledo Case (247 U. S. 402, 62 L. Ed. 1186) in holding that the misconduct of petitioner occurred constructively in the presence of the court, although actually occurring at points geographically remote therefrom, upon the theory that by a chain of causation it took effect there. The decision, therefore, is in conflict with Nye v. United States, 313 U. S. 33, 85 L. Ed. 1172, and with decisions of other Circuit Courts of Appeals (Wimberly v. United States, 119 Fed. (2d) 713; Warring v. Colpoys, 122 Fed. (2d) 642).

POINT II.

Prosecution of petitioner under the information was barred by the statute of limitations, and laches, since all acts of alleged misconduct occurred more than three years next before the filing of the information. Under controlling decisions of this court this prosecution was subject to the three-year statute of limitations (R. S. Sec. 1044; 18 U. S. C. A., Sec. 582) relating to offenses (not capital) against the United States. The majority opinion below, however, ruled that the criminal contempt here sought to be charged was not an offense within the meaning of that statute, and that no statute of limitations was applicable thereto either by enactment or analogy. Therein that opinion is in conflict with Gompers v. United States, 233 U. S. 604, 58 L. Ed. 1115, United States v. Goldman, 277 U. S. 229, 72 L. Ed. 862, and Ex Parte Grossman, 267 U. S. 87, 69 L. Ed. 527.

POINT III.

The conviction below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States that, if he entered a plea of guilty to an indictment charging income tax evasion, he would not be prosecuted for alleged contempt. Petitioner performed that agreement. Under the rule declared by this court in United States v. Ford, 99 U. S. 593, 24 L. Ed. 399, such agreement vested in petitioner an equitable right to have any prosecution for contempt stayed pending an application for executive clemency. The majority opinion below, in refusing to give effect to the agreement, is in conflict with the foregoing decision of this court.

POINT IV.

The trial court was without jurisdiction to entertain this proceeding. It was at most a statutory court of limited equitable jurisdiction. This proceeding is an independent prosecution at law for criminal contempt, and is neither incidental nor ancillary to the original equitable litigation before the statutory court. That court could neither acquire nor exercise jurisdiction thereover. In holding that the instant proceeding was incidental to the original equitable litigation pending before the trial court, the decision of the majority opinion below is in conflict with Gompers v. Stove Company, 221 U. S. 418, 55 L. Ed. 797, and Michaelson v. United States, 266 U. S. 42, 69 L. Ed. 162, l. c. 167, and, in further holding that the trial court was vested with jurisdiction herein, such decision is in conflict with the decision of this court in this case (Pendergast v. United States, 314 U. S. 574, 86 L. Ed. 55) and with Phillips v. United States, 312 U. S. 246, 85 L. Ed. 800, Public Service Commission v. Brashear Freight Lines, 312 U. S. 621, 85 L. Ed. 1082, and Ex Parte Bransford, 310 U. S. 354, 84 L. Ed. 1249. When the trial court was thus without jurisdiction, its action could not be validated by the circumstance that one of its members, at the time of the institution of the original rate litigation, was judge of the Central Division of the Western District of Missouri. The trial court conceded that at the time of the institution of this proceeding no member thereof was judge of such Central Division.

F.

ARGUMENT.

POINT I.

The conduct of petitioner did not constitute misbehavior on his part in the presence of the court or so near thereto as to obstruct the administration of justice, within the meaning of Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385), and did not render him punishable for contempt upon information; the majority opinion below (Riddick, J., dissenting), in holding him thus punishable therefor, is in conflict with applicable decisions of this Court and with decisions of other Circuit Courts of Appeals on the same matter.

Petitioner contends that the majority opinion below upon this issue is in plain conflict with the unambiguous terms of the statute under which the prosecution has been conducted, and, as well, with the last controlling decision of this Court. Section 268, Judicial Code, 28 U. S. C. A., Sec. 385; *Nye* v. *United States*, 313 U. S. 33, 85 L. Ed. 1172. That plain conflict is strikingly demonstrated by the dissenting opinion (R. 1206-1212).

The position of petitioner briefly is this: the foregoing statute declares that, before petitioner can be punished for contempt upon information or other form of summary proceeding, it must appear that he, at the time of the misbehavior relied upon as constituting the contempt, was in the presence of the court or so near thereto as to obstruct the administration of justice; his presence before the court, or in the proximity indicated, must have been actual and not constructive; and if he was not thus in the actual presence of the court or in such proximity, it is immaterial whether his misbehavior elsewhere by any chain of causation eventually took effect in the presence of the court. The misbehavior charged must have occurred in the presence of the court or in the required proximity thereto; the person charged with the misbe-

havior must, at the time thereof, have been in the presence of the court or in the required proximity thereto. For prosecution of a given person for contempt upon information there must appear misbehavior on the part of *that* "person in their presence, or so near thereto as to obstruct the administration of justice". If the person charged was not thus present, if at the time of misbehavior he was geographically removed from the presence of the court, then, however obstructive to the administration of justice his misbehavior should prove, irrespective of the circumstance that such misbehavior by its resulting consequences took effect in the actual presence of the court, he can be prosecuted only by indictment. *Section 135, Criminal Code, 18 U. S. C. A., Sec. 241.* As a corollary to the foregoing proposition, authoritative construction of the contempt section above cited has attached the further condition that, for summary prosecution upon information, it is essential that the misbehavior of the person charged in the vicinity of the court must be of a character "disrupting its quiet and order or actually interrupting the court in the conduct of its business". *Nye v. United States, supra,* l. c. 52. There are, therefore, two prerequisites to prosecution for contempt upon information: (a) the actual presence of the person charged at the time of misbehavior before the court or in immediate geographical proximity thereto; (b) disruptive misbehavior on his part when thus present. Neither prerequisite appears in the instant case.

The present law of contempt stems from the statute of March 2, 1831 (4 U. S. Statutes at Large 487):

"Statute II.

March 2, 1831.

"An Act declaratory of the law concerning contempts of court.

es for mmary ceedings.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the power of the several courts of the

United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or, any other person or persons, to any lawful writ, process, order, rule decree or command of the said courts.

Sec. 2. And be it further enacted, That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.

Approved, March 2, 1931."

The first section of the foregoing Act is now Section 268 of the Judicial Code (28 U. S. C. A., Sec. 385):

"Sec. 385. (Judicial Code, Section 268.) Administration of oaths; contempts. The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts (R. S., Sec. 725; Mar. 3, 1911, Ch. 231, Sec. 268, 36 Stat. 1163)."

The second section of the 1831 Act is now Section 135 of the Criminal Code (18 U. S. C. A., Sec. 241):

> "Sec. 241. (Criminal Code, Section 135). Attempting to influence witness, juror, or officer. Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both (R. S., Secs. 5399, 5404; Mar. 4, 1909, Ch. 321, Sec. 135, 35 Stat. 1113)."

This court has pointed out (*Nye* v. *United States, supra*) that for nearly a century following the 1831 Act authoritative construction accepted its plain, natural interpretation. *Ex parte Poulson,* 19 Fed. Cases 1205, case No. 11350, l. c. 1208; *Ex parte Schulenburg,* 25 Fed. 211, l. c. 214; *Boyd* v. *Glucklich,* 116 Fed. 131, l. c. 136; *Ex parte Robinson,* 86 U. S. 505, 22 L. Ed. 205. The controlling effect of the foregoing authorities was recently recognized by the court below. *Morgan* v. *United States,* 95 F. 2d 830, l. c. 835. As pointed out by this Court in the *Nye Case,* artificiality first crept into the construction of the Act of 1831 in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 62 L. Ed. 1186. By the majority opinion in that case the distinction between Sections 1 and 2 of the Act of 1831 was destroyed. The requirement that the offender must be in the presence of the court or in the geographical vicinity thereof was abrogated. The further requirement that the misbehavior charged must not only be in the vicinity of the court but must also be disruptive of its

order and decorum was disregarded. The test adopted was one of obstructive *effect* upon the administration of justice. Under that doctrine any act punishable under the second section of the Act of 1831 was equally punishable under the first section, and the restrictions imposed by the Act upon the power to punish on information or other summary process were judicially eliminated. By the Act of 1831 Congress curtailed the power to punish for contempt by summary process; the majority opinion in the *Toledo Case* ignored the curtailment. Before the recent *Nye Case*, this was pointed out strikingly in the dissenting opinions of Mr. Justice Holmes, who continued to adhere strictly to the natural construction of the Act. *Toledo Newspaper Co.* v. *United States, supra*, l. c. 422; *Craig* v. *Hecht*, 263 U. S. 255, l. c. 280, 68 L. Ed. 293. The *Toledo Case*, obliterating the distinction between the first and second sections of the Act, in effect conferred, in the event of an alleged contempt, an election of remedies. The result was grotesque. Under the first section of the Act the power to punish by fine or imprisonment was unlimited except by the discretion of the court concerned in the offense. Under the second section, however, the maximum penalty was a nominal fine or imprisonment for a period of three months, or both. It is inconceivable that Congress, in thus limiting the penalty under the second section, intended that by the *Toledo Case* doctrine of ultimate *effect* the offense could also be punished under the first section by an unlimited penalty. The fundamental fallacy, of course, in the *Toledo Case* was its denial that the first section of the Act rigidly limited the power of the courts to punish for contempt upon information or summary process; thereafter, as Mr. Justice Holmes pointed out, the court could only by such process take action where necessary "in a strict sense * * * to enable him to go on with his work". *Craig* v. *Hecht, supra*. We stress the artificiality of the *Toledo Case* doctrine because the instant proceeding was initiated and prosecuted under the theory of that authority. Thus

the trial court declared that "if the tendency of the misbehavior is to affect the administration of justice, it is contempt" (R. 25). In that opinion it was stated that a letter mailed in London could constitute contempt of a United States court in Missouri "because it takes effect in the presence of the court" or "at any rate it is so near to the presence as to obstruct the administration of justice" (R. 26). Although the trial court considered the *Nye Case*, it adhered to its former views upon final judgment. Thus the trial court remarked (R. 57):

> "The misbehavior of these defendants was committed where it took effect and where it was intended to take effect."

The majority opinion below proceeds upon the same theory that the misbehavior occurred in contemplation of law wherever its *consequences* occurred (R. 1195). *That is the Toledo doctrine. Any* act of misbehavior, in order to violate *either* the first or second sections of the Act of 1831, *must* take *effect* in the presence of the court; otherwise it could not be contemptuous within the contemplation of either section; the distinction between the misbehavior specified in the two sections lies not in the place where the misbehavior takes *effect* but in the place where the misbehavior *occurs*. The fallacy of the Toledo doctrine was that *constructive* presence before the court was substituted for the statutory requirement of *actual* presence before the court; the person charged was held under the doctrine of causal effect to have been present, and there to have committed misbehavior, when he was actually absent and committed his alleged misbehavior elsewhere. The same fallacy permeates the majority opinion below. Petitioner has been found *constructively* in the presence of the court when he was *actually* absent; his misbehavior has been held to have occurred *constructively* in the presence of the court when it *actually* occurred elsewhere; and, as in the *Toledo Case*, these judicial results have been accomplished under the doctrine that, as

matter of law, misbehavior must be held to occur where it takes effect. *The trial court thus reverted to or persisted in following the exploded Toledo Case doctrine of causal effect in the month following its condemnation by this Court.*

We apprehend that in the *Nye Case* this Court plainly rejected the *Toledo Case* test of the place where the misbehavior eventually took effect, the "tendency to obstruct the administration of justice" doctrine, in favor of the test plainly required under the Act of the geographical location of the misbehavior and of the accused. In the Nye opinion it was freely conceded that the misconduct had as its purpose and effect the obstruction of the administration of justice (l. c. 52). Although the trial court in the instant case clung to the view that misbehavior took place where it took effect, and was intended to take effect, to the doctrine that obstructive misbehavior could only take effect in the presence of the court, and that, therefore, if the purpose and effect of the misconduct were an obstruction in the administration of justice, such intended effect brought such misbehavior *constructively* into the presence of the court, the opposite result had been reached by this court in the Nye opinion a month before (l. c. 52). It will be recalled that in the *Nye Case*, as in the instant case, the "effect" or "reasonable tendency" theory was relied upon by the court below to sustain the contempt charged. *Nye* v. *United States*, 113 Fed. (2d) 1006, l. c. 1008. In both cases the Circuit Court of Appeals argued that the misbehavior had the effect, and was intended to have the effect, of interfering with the court in the performance of its functions, and that, therefore, the misbehavior took place constructively where the intended result occurred, i. e., in the presence of the court. This Court, however, held that the words "so near thereto" had a geographical and not a causal connotation (l. c. 48), and that the place where the misbehavior took effect could not "in any normal meaning of the term" alter the admitted fact that such misbehavior actually occurred elsewhere.

The *Nye Case* and the instant case are precisely parallel. In the *Nye Case* the misconduct occurred, the "evil influence" was brought to bear, at a point remote from the court; in the instant case equally the misconduct occurred, the "evil influence" was brought to bear, at a point remote from the court. In the *Nye Case* the court below sought to bring the remote point where the misconduct occurred into the courtroom by the argument that the misconduct there had its intended effect; in the instant case, similarly, the court below seeks to transport into the courtroom points in Chicago, St. Louis and Kansas City by the argument that misconduct there occurring had its intended effect in that courtroom. In the *Nye Case* the defendants personally mailed the motion for dismissal (in the form of a letter) to the court; in the instant case the insurance companies filed a motion for decree, supported by a stipulation executed by counsel for petitioner's codefendant O'Malley. The court below, however, argues that the motion for decree, with the supporting stipulation, was filed or transmitted to the court through counsel as innocent emissaries (R. 1194), and that the latter represented that the compromise was honest and not fraudulent. As the dissenting opinion points out (R. 1211), the statements of counsel added nothing to the mere filing of the motion. The parallel with the *Nye Case* is, nevertheless, inescapable. In that case the innocent emissary was the mailman; in the instant case the innocent emissary was a lawyer. In neither case has any misbehavior occurred in the presence or vicinity of the court; the innocent emissary has not been guilty of misbehavior by reason of his innocence; he who sent the innocent emissary has not been guilty of misbehavior in the vicinity of the court because he has not been there. *The innocent emissary theory of the court below is but another variant of the constructive presence doctrine of the Toledo Case.*

Again, moreover, the parallel does not end. As pointed out in the dissenting opinion below (R. 1211), every act of counsel, relied upon by the majority opinion to support

the theory of misbehavior in the presence of the court, occurred equally in the *Nye Case*. There, as in the instant case, the misconduct at a point remote from the courtroom was sought to be carried into effect in the courtroom by the filing of motions and the appearance of counsel in their support. Thus it appears from the petition for certiorari (p. 2) in the *Nye Case* that the occasion for the citation for contempt was the hearing in open court of a motion to dismiss based upon the fraudulent discharge of Elmore as administrator. This statement is supported by the official record in that proceeding (pp. 155, 156). Hence there is not a single fact or circumstance in the instant case, treated as significant by the majority opinion below, which was not present in the Nye case.

The majority opinion below finally argues that in the instant case the court was deceived, while, in the *Nye Case* Elmore alone was deceived. This attempted distinction is completely answered in the dissenting opinion (R. 1211, 1212). It is plain that the contempt sought to be charged in the *Nye Case* was not the overreaching of Elmore any more than was the contempt sought to be charged in the instant case the bribery of O'Malley; the contempt sought to be charged equally in both cases was the seeking of judicial action to carry into effect a previously perpetrated fraud. This is plainly recognized by the majority opinion at another point (R. 1194).

We have mentioned *supra* that if any person transmits to the court a motion invoking judicial action, he irresistibly implies thereby a representation that his action is in good faith and not a fraud upon the court. Verbal representations to the same effect add nothing thereto. Hence any representations by counsel in the *Nye Case* or the instant case do not go beyond the inevitable implication of good faith arising from the mere filing of the respective motions in both cases. Whether the representation of good faith be express or implied is immaterial. The dissenting opinion so held (R. 1211). Misbehavior

in the presence of the court is a plain, simple, unambiguous term which, as pointed out in the Nye opinion, must be construed in its normal meaning (l. c. 52). It cannot be extended by construction or interpretation. *Realistically viewed, taking the term in its normal meaning, where did the misconduct, the misbehavior, of petitioner occur? Is it not plain, that it occurred in Chicago, St. Louis and Kansas City, at points remote from the courtroom?* There was no misbehavior by any person in the presence or vicinity of the court. The conduct of counsel was entirely ethical and in every respect irreproachable. How, then, unless we extend the term "misbehavior" beyond its normal acceptation, can it be said that their conduct constituted misbehavior? Petitioner admittedly was not present at any time in the vicinity of the court. The majority opinion below seeks to twist the issue into whether, if the charge were a conspiracy to perpetrate a fraud upon the court, the act of an innocent emissary could be chargeable to a person then elsewhere. That is not the issue; if it were, the act of the mailman, of counsel, in the *Nye Case* would have been charged to Nye. The true issue is much narrower, namely, whether the proof establishes misbehavior of petitioner in the presence of the court. The issue is not one of criminal responsibility for the act of another, but one simply of the geographical location of the accused and of the occurrence of particular misbehavior. The innocent emissaries did not misbehave in the presence of the court; petitioner did not misbehave in the presence of the court.

We submit that the dissenting opinion properly declares (R. 1211):

> "I perceive no distinction between the Nye case and this case. None is drawn by the majority opinion."

The majority opinion below is in conflict with the *Nye Case* not only in that it reverts to the Toledo doctrine of petitioner's constructive presence before the court, if his

misbehavior eventually took effect there, but as well in its disregard of the further requirement that the misbehavior charged must be of a character "disrupting its quiet and order or actually interrupting the court in the conduct of its business" (l. c. 52). In both respects it is equally in conflict with *Wimberly* v. *United States*, 119 Fed. (2d) (5th Circuit) 713, l. c. 714 and *Warring* v. *Colpoys*, 122 Fed. (2d) (C. A. D. C.) 642. See also: *Millinocket Theatre* v. *Kurson*, 39 Fed. Supp. 979, l. c. 980.

Petitioner was not a party to the insurance rate litigation and is not shown to have been connected, directly or indirectly, with any court procedure followed. He is not shown to have had any notice or knowledge of any procedural steps intended to be taken. A layman may be charged with knowledge of the substantive law; he is not charged with knowledge of procedural law. The method pursued by the companies to obtain judicial approval of the proposed distribution was entirely unnecessary. The companies had an absolute right to dismiss; and, upon dismissal, under the controlling decisions of the Missouri Supreme Court (*Aetna Insurance Co.* v. *O'Malley*, 342 Mo. 800, 118 S. W. (2d) 3, l. c. 9, 10), the court was under the mandatory *jurisdictional* duty of turning over impounded funds to the Superintendent of Insurance for distribution. Under such circumstances, without evidence that petitioner had any notice of the extrajurisdictional proceedings taken, recognizing that a criminal intent is as essential in a contempt proceeding as in any other offense (*United States* v. *Jose*, 63 Fed. 951, l. c. 954), the argument that Pendergast either knew, intended, or should have anticipated, that any act of his would take effect in the presence of the court becomes absurd.

Acts of misconduct occurring at points remote from the vicinity of the court may justify indictment under the "effect" or "reasonable tendency" theory for obstruction of justice within the meaning of the second section of the Act of 1831; they cannot justify summary punishment upon information within the reasonable intendment of

the restrictive provisions of the first section of that Act. In the phraseology of Mr. Justice Holmes, this proceeding was not initiated for the present protection of the court from actual interference, but as a means of postponed retribution for past acts. The action of the court below was not necessary "in a strict sense in order to enable (them) to go on with (their) work". Petitioner, at the time of misconduct, was neither in the presence of the court nor in the required proximity thereto. No misbehavior on his part either occurred in the vicinity of the court or disrupted its quiet, order and decorum or actually interrupted the court in the conduct of its business. Under all authorities, *save only the overruled opinion in the Toledo Case*, the acts in question do not constitute contempt punishable upon information. The dissenting opinion below very properly points out that this proceeding "raises matters of grave importance" (R. 1207). Further (R. 1212):

> *"The question of the power of a federal court to act in any case is always a question of importance. It is never, as intimated in the opinion of the district court, a mere technicality.* But in cases in which the question is of the power of the court to punish a criminal summarily in a manner different from that commonly and ordinarily provided for criminal trials, the question of the court's power must be of the gravest importance. The gravity of the crime only adds to the gravity of the question with which the court is confronted." (Italics ours).

It is submitted that, unless the majority opinion is reviewed by this Court, the substantive law of contempt in courts of the United States will be left in a state of chaotic confusion.

POINT II.

The prosecution of petitioner under the information was barred by the statute of limitations, and laches, since any and all acts of alleged contempt occurred more than three years next before the filing of the information; the majority opinion below, in holding that the prosecution was not thus barred, and in further ruling that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) was inapplicable to this proceeding either by analogy or enactment, is in conflict with applicable decisions of this court, or, if the ruling below is not in conflict with decisions of this court, as petitioner contends, such majority opinion has decided an important question of federal law which has not been, but should be, settled by this court.

Since misbehavior alone is the offense prosecuted, then that offense became complete if and when the misbehavior occurred. Misbehavior, in any normal sense of the word, means improper acts. Acts must have specific time and place. The specific time of the acts charged against petitioner was more than three years next before the filing of the information. The majority opinion proceeds upon the theory that the misbehavior in question was the presentation to the court for its approval of a fraudulent compromise. The motion for decree, reciting the fact of the compromise, was filed on June 18, 1935 (R. 603). The stipulation of settlement was filed on June 19, 1935 (R. 607). The actual compromise was consummated by an agreement of May 18, 1935. The appearances of counsel occurred shortly after the filing of the motion for decree and the stipulation of settlement. On February 1, 1936 the court entered its decree, pursuant to the motion filed, dismissing the causes and directing the distribution of the impounded funds (R. 617). Nothing occurred in the insurance rate litigation for more than three years thereafter, until on May 29, 1939 the successor Superintendent of Insurance filed a motion to cite the insurance companies to show cause why the de-

cree of February 1, 1936 should not be vacated (R. 746). The information in the instant proceeding was filed on July 13, 1940 (R. 1). Hence it is undisputed that the information was not filed within three years next after the alleged contempt charged, with the result that the appropriate statute of limitations (R. S., Sec. 1044; 18 U. S. C. A., Sec. 582) is applicable:

> "No person shall be prosecuted, tried, or punished for any offense, not capital, * * * unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed * * *."

This is a prosecution for criminal contempt initiated by an information in the name of the United States and prosecuted by the United States. A sentence of two years in the penitentiary has been imposed; punishment by fine or imprisonment in such a proceeding is unlimited. It can scarcely be argued, therefore, that this criminal contempt is not an *offense* within the meaning of the statute. That criminal contempt is such an offense was specifically determined by this court in *Gompers* v. *United States*, 233 U. S. 604, l. c. 610, 58 L. Ed. 1115, *United States* v. *Goldman*, 277 U. S. 229, 72 L. Ed. 862, and *Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527. See also: *Hart Investment Co.* v. *Oil Co.*, 27 Fed. Supp. 713. The reasoning and language in the *Gompers Case* (l. c. 612, 613) compel, it is submitted, the application of the foregoing statute of limitations to the instant prosecution. If it is applied, there can be no question but that the prosecution is barred.

The majority opinion below holds that the contempt here charged is contempt in the presence of the court, and that the statute of limitations is applicable neither by analogy nor enactment. We have noted under the assignment next preceding that the majority opinion brings the misbehavior charged into the presence of the court only constructively, and not actually, by resort to the causal effect doctrine of the *Toledo Case*. Upon that as-

sumption, however, such opinion proceeds upon the theory that the statute of limitations is applicable to every form of criminal contempt *except* that occurring in the presence of the court. By that reasoning prosecution for contemptuous violation of a judicial decree would be barred by limitations; by that reasoning prosecution for misbehavior, not in the presence of the court, but so near thereto as to obstruct the administration of justice, would be barred by limitations; but by that reasoning, however, prosecution for misbehavior in the presence of the court would *never* be barred by *any* statute of limitations. We submit that, for purposes of limitations, no such distinction can be created between different *forms* of the same *offense*. The pertinent matter is that any criminal contempt is an offense, as this court clearly ruled in the authorities cited; and it is difficult to understand upon what theory the majority opinion can rule that one form of criminal contempt is an offense while another form is not. It is difficult to understand upon what theory it can be argued that a criminal contempt constituted of the procurement of an order is subject to *no* statute of limitations, while a criminal contempt constituted of disobedience to an order *is* subject to such limitations. In the *Gompers Case* there was *no* formal information; in the instant case there *was* a formal information upon the official oath of the acting United States Attorney in the name of the United States. That information is being prosecuted by the United States concededly for criminal contempt. It, therefore, appears that the status of the instant proceeding as a prosecution for an *offense* within the meaning of the statute of limitations, *supra*, is clearer than in the *Gompers Case*. The majority opinion does not seek to justify the distinction made upon principle; *it could not be thus justified;* it rests the claimed distinction solely upon the following statement in the *Gompers Case* (233 U. S. 604, l. c. 606, 58 L. Ed. 1115):

> "The inquiry was directed solely with a view to punishment for past acts, not to secure obedience for

> the future; and to avoid repetition it will be understood that all that we have to say concerns proceedings of this sort only, and further, only proceedings for such contempt not committed in the presence of the court."

In thus stressing the foregoing excerpt the court below ignored the following sweeping declaration of policy in the same opinion (l. c. 612):

> "The power to punish for contempt must have some limit in time, and in defining that limit we should have regard to what has been the policy of the law from the foundation of the government."

Also disregarded is the excerpt from the opinion of Chief Justice Marshall, quoted by Mr. Justice Holmes in the *Gompers Case*, wherein it is pointed out that not even treason can be prosecuted after a lapse of three years, and intimating that it would be manifestly incongruous for there to be *no* limitation upon the prosecution of a *lesser* offense.

The fallacy of the argument advanced below is that Mr. Justice Holmes, in excepting from the opinion in the *Gompers Case* contempts committed in the presence of the court, did not intend thereby that there should be no limitation upon prosecution of such contempts but, to the contrary, intended that prosecution of such *direct* contempts should be more restrictively limited in time than the type of contempt there under consideration. An analysis of the Gompers opinion will reveal that Mr. Justice Holmes used the phrase contempt committed "in the presence of the court" in the usual accepted sense of *direct* contempt, of contempt *in the face of the court*, which can be punished, upon the personal knowledge of the judicial officer, without notice, information, evidence, hearing or trial. See *Ex parte Terry*, 128 U. S. 289, 32 L. Ed. 405, wherein the court intimated (l. c. 314) that there was a grave question whether that type of procedure could be approved either at a subsequent term or even upon a subsequent day of the same term. Clearly Mr. Justice

Holmes did not intend his opinion (and such was the purpose of his exception) to be misconstrued as authorizing procedure of that character at any time within three years next after the occurrence of the misbehavior charged. Such is the general law. *Brewer* v. *State*, 176 Miss. 803, 170 So. (Miss.) 540; *In re Cary*, 165 Minn. 203, 206 N. W. (Minn.) 402; *In re Maury*, 205 Fed. 626; *Middlebrook* v. *State*, 43 Conn. 257, l. c. 269; *In re Foote*, 76 Cal. 543, 18 Pac. (Cal.) 678; *Brown* v. *State*, 178 Okla. 506, 62 Pac. (2d) 1208.

It thus appears that direct contempts in the presence or face of the court, in the sense that term is used, would require substantially instant and immediate action, or punishment (by that anomalous procedure) is barred. Constructive contempts, on the other hand, are uniformly barred by the application thereto of the general statute of limitations for criminal offenses. Hence under the general law there is no justification for the suggestion of the court below that the time for prosecution of contempts committed in the presence of the court is unlimited; as has been seen, such time (if punishment is to be assessed upon the personal knowledge of the court) is more rigidly limited than in the case of other contempts. Where the prosecution, however, is initiated by information, for criminal contempt, as in the instant case, the statute of limitations, *supra*, is applicable thereto and bars that prosecution. Such has been the consistent construction of the *Gompers Case*. *Appeal of Marks*, 144 Pa. Sup. Ct. R. 556, 20 Atl. (2d) (Pa.) 242; *In re Jibb*, 123 N. J. Eq. 251, 197 Atl. 12; *Hart* v. *Oil Co.*, 27 Fed. Supp. 713. The doctrine of the *Gompers Case* is as well supported by the weight of authority. *Beattie* v. *People*, 33 Ill. App. 651; *Goodall* v. *Superior Court*, 37 Cal. App. 723, 174 Pac. 924; *Gordon* v. *Commonwealth*, 141 Ky. 461, 133 S. W. 206; *Brewer* v. *State*, 176 Miss. 803, 170 So. (Miss.) 540; *Pate* v. *Toler*, 190 Ark. 465, 79 S. W. (2d) (Ark.) 444; *State* v. *Phipps*, 174 Wash. 443, 24 Pac. (2d) (Wash.) 1073.

If a distinction is to be drawn between direct and constructive contempts, the contempt sought to be charged in the instant case is plainly constructive. No one would argue that the trial court, as in the case of direct contempt, could have proceeded upon its own knowledge without information, hearing or trial. If petitioner was in the presence of the court, that presence was constructive and not actual. Whether a given contempt is constituted of the procurement of an order or of disobedience to an order, whether the misbehavior is constructively in the presence of the court or merely in its vicinity, it remains a criminal contempt, subject to the same doctrines, rules and limitations, prosecuted in the same manner, punished in the same way. *Neither upon principle nor upon authority can the controlling effect of the Gompers Case be avoided.* In the words of Mr. Justice Holmes, the power to punish for contempt must have some limit in time; this doctrine the majority opinion below ignored.

After the filing of the motion for decree, supported by the stipulation of settlement, the statutory court in the insurance rate litigation on February 1, 1936 dismissed the cause (R. 617). It reserved jurisdiction solely for the purpose of effectuating its then decree (R. 623). The majority opinion, by way of dictum, holds that so long as such reservation of jurisdiction continued the cause remained pending before the statutory court, and that no prosecution for any contempt prior to February 1, 1936 could ever be barred so long as the cause remained pending in the sense aforesaid. In that sense the cause would continue to pend in perpetuity since it is a matter of common knowledge that *all* policyholders could *never* be found and hence the decree could *never* be completely effectuated. In all deference to the court below, we submit that such a doctrine is novel and supported by authority from no jurisdiction. It would completely nullify the doctrine of the *Gompers Case*, and render nugatory the effect of any applicable statute of limitations. The authorities cited in the majority opinion (*Ex parte Terry*,

128 U. S. 289; *In re Maury*, 205 Fed. 629; *In re Cary*, 165 Minn. 203, 206 N. W. (Minn.) 402) do not sustain the proposition advanced by the court; they hold merely that, where punishment is sought to be imposed for a direct contempt committed in the face of the court, without information or trial, upon the basis of the personal knowledge of the judicial officer, the action taken must be substantially immediate but may on occasion be deferred until the end of actual trial to avoid the dislocation of trial processes. They do not purport to authorize such punishment at *any* time, however long deferred, after the offense, merely because the court retained some vestige of jurisdiction in the cause. As pointed out *supra*, with authorities cited, the rule as to direct contempt and its punishment restricts rather than extends the time for action. This issue need not be further discussed since we understand the opinion below so to hold only upon the assumption that no statute of limitations applies to this contempt proceeding. *Such is not the law.*

The ruling below is in plain conflict with the *Gompers*, *Goldman*, and *Grossman Cases* cited *supra*. If it is not literally thus in conflict, the applicability of the statute of limitations to criminal contempts of the type here sought to be charged is plainly a federal question which should be settled by this court.

POINT III.

The conviction below should be reversed, and further proceedings stayed, for the reason that the prosecution of petitioner under the information is in violation of his agreement with the United States; and the majority opinion below, in refusing to give effect to such agreement, has decided a federal question in a way probably in conflict with applicable decisions of this court or, if such ruling is not thus in conflict, as petitioner contends, the majority opinion has decided an important question of federal law which has not been, but should be, settled by this court.

The facts relating to the agreement of petitioner with the United States have been heretofore reviewed. *Supra*,

Summary Statement of the Matter Involved, pp. 6 et seq. It is clear that petitioner has the right in the instant proceeding to invoke the benefit of this agreement under which it was particularly covenanted by the United States that there would be no prosecution for contempt. There can be no question but that the present prosecution has been initiated and is being conducted by the United States. It originated in an information upon the official oath of the acting United States Attorney in the name of the United States. It is prosecuted by the United States. Punishment has been imposed by sentence to be served in a penitentiary of the United States. The proceeding is one for criminal contempt between the United States on the one hand and petitioner upon the other, and is neither incidental nor ancillary to the civil insurance rate litigation. It is an independent criminal proceeding at law. It has been under the control of the United States in every respect from its inception.

An agreement of the character described concededly creates no legal rights which justify at law a plea in bar. It does, however, confer upon the accused an unmistakable equitable right which will be judicially enforced. That right is the right to executive clemency because, in the words of this Court in the authority cited *infra*, "public policy and the great ends of justice" require that the United States keep faith. The benefit of the agreement is preserved procedurally by staying further proceedings indefinitely until executive clemency can be had. *United States* v. *Ford*, 99 U. S. 593, 25 L. Ed. 399. The stay granted is indefinite in duration because no court will assume that the Executive will deny the pardon to which the accused is equitably entitled. The power of the Executive to extend clemency for the offense charged is unquestioned. *Ex parte Grossman*, 267 U. S. 87, 69 L. Ed. 527. See also: *State* v. *Guild*, 149 Mo. 370, l. c. 376, 50 S. W. 909.

There can be no distinction between the equitable right flowing from an agreement between the United States

and an accomplice, in consideration whereof the latter testifies, and the equitable right flowing from an agreement between the United States and an accused, in consideration whereof the latter pleads guilty to one offense under a stipulation on the part of the United States that he will not be prosecuted for other related offenses. This equitable right was duly pleaded (R. 35), and its disregard requires reversal with a stay of further proceedings.

The issue is not, as suggested by the majority opinion, whether the United States Attorney bound or attempted to bind the statutory court; the issue is that the United States Attorney *did* bind the United States. This is a prosecution by the United States and under its control, and not a prosecution by the trial court initiated by citation. If the court had proceeded independently of the United States, a different question, academic here, might be presented. *It did not do so.* The United States prosecuted, and, prosecuting, violated its agreement. We submit that plainly the ruling below is either in conflict with *United States* v. *Ford, supra*, or, if not in literal conflict, presents an important question of federal law which has not been, but should be, settled by this court.

POINT IV.

The court below was without jurisdiction to entertain this proceeding; and the majority opinion below, in holding that the purported statutory court was vested with such jurisdiction, and in further holding that the conviction of petitioner was in any event validated by the fact that one of the members of such court, as then district judge for the Central Division of the Western District of Missouri, issued the original restraining order in the insurance rate litigation, has decided a federal question in a way probably in conflict with applicable decisions of this court.

The court below purported to act as a statutory court constituted in accordance with the provisions of Section

266 of the Judicial Code (28 U. S. C. A., Sec. 380). Without waiving other jurisdictional defects, petitioner points out at this time that the jurisdiction of a statutory court is of an extremely limited equitable character, and is restricted to the granting or denial of injunctive relief against the enforcement of unconstitutional statutes. *Phillips* v. *United States*, 312 U. S. 246, 85 L. Ed. 800; *Public Service Commission* v. *Brashear Freight Lines*, 312 U. S. 621, 85 L. Ed. 1082; *Ex parte Bransford*, 310 U. S. 354, 84 L. Ed. 1249. That limited statutory equitable jurisdiction could not extend to entertaining a prosecution by the United States at law for criminal contempt. The latter is a prosecution for an offense against the United States. It is between the public and the defendants. It is neither a part of nor incidental or ancillary to the cause out of which the contempt originally arose. *Gompers* v. *Stove Co.*, 221 U. S. 418, 55 L. Ed. 797; *Russell* v. *United States*, 86 Fed. (2d) 389, l. c. 392; *Michaelson* v. *United States*, 266 U. S. 42, l. c. 64, 69 L. Ed. 162, l. c. 167. Under the foregoing authorities a prosecution for criminal contempt is "a separate and independent proceeding at law" (*Gompers Case*, l. c. 451; *Michaelson Case*, l. c. 64). As was pointed out in the *Gompers Case* (l. c. 444); if this was not a proceeding at law for criminal contempt, but was incidental to the original equitable litigation, the court below was without authority to impose a punitive sentence. In point of fact, the instant proceeding in its course from origin to final judgment is the converse of the *Gompers Case*. There the proceeding began as incidental to equitable litigation and, upon final judgment, was sought to be converted into an action at law for criminal contempt. Here the proceedings began upon information filed by the United States as a proceeding at law for criminal contempt, and at the time of final judgment the trial court sought to convert it into a proceeding incidental to the original equitable litigation (R. 66, 1184). Neither attempt can be approved under the Gompers opinion. Although the trial court, by the

mere restyling of pleadings already filed, sought to convert this proceeding into one incidental to the insurance rate litigation, upon the theory that the statutory court could exercise jurisdiction in that type of proceeding, it nevertheless attempted to impose punitive sentences forbidden in an incidental or ancillary proceeding. *Gompers* v. *Stove Co., supra.* The character of such a proceeding, moreover, is not tested by any artificial standard such as the styling of the cause. If it is initiated by information by the United States, and is designed for punitive purposes for past acts, it cannot be incidental to any other litigation and is an independent prosecution. *Gompers* v. *Stove Co., supra; In re Fox*, 96 Fed. (2d) 23, l. c. 25; *United States* v. *Bittner*, 11 Fed. (2d) 93, l. c. 95. It scarcely need be argued that the statutory court possessed no criminal jurisdiction at law over such a proceeding. *Hence we are confronted with this situation: the statutory court was without jurisdiction since this was a criminal prosecution at law, but if the statutory court was right in styling it as incidental to equitable litigation, that court was without authority to impose a punitive sentence.* In either event petitioner's conviction and sentence cannot stand; in either event the majority opinion is in conflict with applicable decisions of this Court.

The trial court in its opinion ruled (R. 22):

"It is contended that this court 'is a statutory tribunal of limited jurisdiction and that it is without jurisdiction in this proceedng.' The reasoning of counsel is this:

This three-judge court is a three-judge court of the *Central Division* of the Western District of Missouri, and is 'A *separate and distinct tribunal' of that division*, *Steers* v. *U. S.*, (C. C. A. Mo.) 297 Fed. 116, 118. By rule of court made pursuant to statute (Title 28, Sec. 27, U. S. C.) Judge Collet now is the federal district judge assigned to the Central Division. Judge Collet, therefore, and he alone, has jurisdiction of offenses

committed against any federal district court (three-judge court or otherwise) sitting in and for the Central Division, *provided the offense is an independent proceeding and not incidental to the original litigation pending before the three-judge court.*

The reasoning is sound. The last mentioned hypothesis is error."

It will be noted that the trial court conceded that the reasoning was sound, but argued that the hypothesis, *i. e.*, that this prosecution for criminal contempt is an independent proceeding, was error. It is plain under the authorities that the hypothesis is *not* error but the law. Hence the only court with jurisdiction over this proceeding was Judge Collet who by rule of court made pursuant to statute was the federal district judge assigned to the Central Division. This Court clearly indicated that the purported statutory court was without jurisdiction. *Pendergast* v. *United States*, 314 U. S. 574, 86 L. Ed. 55.

The majority opinion, in holding that the statutory court was vested with jurisdiction in this proceeding, was in conflict not only with the decisions of this Court cited *supra* but as well with the decision of this Court (*supra*) in this particular case. When the trial court was without jurisdiction, its action could not be validated by the circumstance that one of its members, *at the time of the institution of the original insurance rate litigation*, was judge of the Central Division of the Western District of Missouri. *The question presented is whether the statutory court was vested with jurisdiction over this proceeding at the time this proceeding was instituted.* Jurisdiction was plainly lacking.

Conclusion.

There were other issues presented to the Circuit Court of Appeals which could be here presented. Petitioner has, however, confined his application to questions of grave public importance. The dissenting opinion below properly recognizes the importance of the issues here involved.

The orderly administration of justice, particularly in contempt proceedings, can only be subserved by the review sought by petitioner.

Respectfully submitted,

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